**STATE OF CALIFORNIA** Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

March 4, 2010

Phil Siegel
C.F.O. and Interim C.E.O.
Telscape Communications, Inc.
606 East Huntington Drive
Monrovia, CA 91016

**Re: Request For Exception Under Labor Code § 1402.5 (Cal-WARN Act)**
**Employer: Telscape Communications, Inc.**

Dear Mr. Siegel:

This letter is in response to Telscape Communications, Inc.'s (Telscape) January 16, 2009, submission to the Department of Industrial Relations and subsequent submission to the Labor Commissioner's Office on March 13, 2009. In both submissions, Telscape claims it is excused from giving full notice to its employees as required in California Labor Code § 1401(a)[1] of the Worker Adjustment and Retraining Notification Act ("Cal-WARN Act") when it ceased substantially all of its Wireline Service sales operations, resulting in the termination of 159 employees on December 12, 2008. Telscape claims it is exempt from the notice requirements of the Cal-WARN Act on the basis that it was an employer actively seeking capital or business at the time notice would have been required as set forth in Section 1402.5.

The Director referred the matter to California Labor Commissioner Angela Bradstreet for review. Based upon a review of the facts of this case and the applicable law, the Director adopts the finding of the Labor Commissioner, as incorporated herein, and determines that Telscape does not meet the requirements of Section 1402.5 and therefore is not excused from providing its affected employees with the 60-day notice required by Section 1401(a).

## I. FACTUAL BACKGROUND

### Evidence Submitted in Support of Exemption

Telscape submitted to the Office of the Director and to the Labor Commissioner your letter dated January 16, 2009, signed under penalty of perjury, alleging that Telscape ceased substantially all of its Wireline Service sales operations and terminated 159 employees on December 12, 2008. Attached as Exhibit "A" to the January 16, 2009, letter is a letter dated December 12, 2008, addressed to the State Employment Development Department and local officials purporting to give notice under the Cal-WARN Act. The December 12, 2008, letter states that Telscape will be ceasing substantially all of its Wireline Service sales operations effective that same date. The January 16, 2009, letter states that "notice was shortened based on the Company's reasonable good faith belief that providing prior notice would have prevented the

[1] All statutory section references are to the California Labor Code unless otherwise indicated.

Company from securing the business and capital it was actively seeking and which was necessary to avoid the termination of the Wireline Service sales operations." Telscape also asserts in the January 16, 2009, letter that it retained the services of an investment banker and took other steps to secure funds for the Company and reasonably believed its efforts would prove successful, only learning in the week prior to December 12, 2008, that its efforts had failed.

Attached to the January 16, 2009, letter as Exhibit "B" is an engagement agreement dated October 24, 2008, between Houlihan Lokey and Telscape whereby Houlihan Lokey was to provide financial, advisory, and investment banking services "in connection with the possible merger, consolidation, joint venture, partnership, spin-off, business combination, tender or exchange offer, acquisition, sale, transfer or other disposition of assets or equity interests or similar transactions, involving all or a substantial portion of the business, assets or equity interests of the Company and/or any of its subsidiaries or affiliates, in one or more related transactions." The engagement agreement also provides that "Houlihan Lokey's services will exclusively consist of assisting the Company in the following: (a) drafting a bid procedure letter to be delivered to potential acquirors of the Company, (b) reviewing and providing feedback to the management presentation, as prepared by the Company, to be delivered to potential acquirors, (c) organizing an online data room, (d) evaluating letters of intent regarding a Transaction, (e) selecting an acquirer of the Company based on such letters of intent, and (f) negotiation of the purchase agreement and other financial aspects in order to consummate a Transaction." (*See* page 1, paragraph 1 of the October 24, 2008 engagement agreement.)

On March 13, 2009, (erroneously dated 2008) in response to a request for information from the Labor Commissioner's Office, Telscape provided its Balance Sheet dated December 31, 2008, a "Financial Flash" dated December 31, 2008, and portions of Financial Statements as of December 31, 2007 (pages 11 and 15 are missing). Telscape indicates in its March 13, 2009, letter that the financial statements show significant losses incurred in 2008. Telscape also attached bank and credit arrangement documents Telscape states reveal outstanding loans.

## II. THE ACTIVELY SEEKING CAPITAL OR BUSINESS EXCEPTION UNDER SECTION 1402.5

The notice requirement exception contained in Section 1402.5 provides:

(a) An employer is not required to comply with the notice requirement contained in subdivision (a) of Section 1401 if the department determines that all of the following conditions exist:

(1) As of the time that notice would have been required, the employer was actively seeking capital or business.

(2) The capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination.

(3) The employer reasonably and in good faith believed that giving the notice required by subdivision (a) of Section 1401 would have precluded the employer from obtaining the needed capital or business.

(b) The Department may not determine that the employer was actively seeking capital or business under subdivision (a) unless the employer provides the Department with both of the following:

(1) A written record consisting of all documents relevant to the determination of whether the employer was actively seeking capital or business, as specified by the Department.

(2) An affidavit verifying the contents of the documents contained in the record.

(c) The affidavit provided to the Department pursuant to paragraph (2) of subdivision (b) shall contain a declaration signed under penalty of perjury stating that the affidavit and the contents of the documents contained in the record submitted pursuant to paragraph (1) of subdivision (b) are true and correct.

**A. <u>Actively Seeking Capital Or Business</u>**

Section 1402.5(a)(1) requires that the employer must have been actively seeking capital or business as of the time notice "would have been required," which is at least 60 days prior to the effective date of any mass layoff, relocation, or termination.

Here, Telscape ceased its Wireline Service sales operations and terminated the affected workers on December 12, 2008. Thus, notice was required as of October 13, 2008. However, the engagement letter cited as evidence of seeking capital or business was entered into on October 24, 2008, after notice was required.

Telscape presents no facts indicating that Telscape was "actively seeking capital or business" at the relevant time, that is, as of October 13, 2008. Moreover, once Telscape retained an investment banker several days later, it was not for purposes of seeking capital or business but rather to assist in the sale of the business or disposition of the company's assets. (*See* October 24, 2009 engagement agreement.)

There are no California published cases interpreting Section 1402.5. Section 1402.5 is modeled in substantial part, however, upon the "faltering company" exception set forth in the federal Worker Adjustment and Retraining Notification Act ("Warn Act"), which provides:

> An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was

> actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(*See* 29 U.S.C. § 2102(b)(1).) While federal law is not binding on California courts, "when California laws are patterned after federal statutes, federal decisions interpreting the federal provisions are persuasive authority." (*See Alcala v. Western Ag Enterprises* (1986) 182 Cal. App. 3d 546, 550.) Regulations promulgated by the United States Department of Labor to interpret and implement the federal Warn Act provide that an employer seeking to qualify for the faltering company exception must demonstrate that the following four conditions are satisfied:

(1) the employer was actively seeking capital or business at the time the notice would have been required;

(2) there was a realistic opportunity to obtain the financing or business sought;

(3) the financing or business sought would have been sufficient, if obtained, to keep the business open for a reasonable period of time; and

(4) the employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business.

(*See* 20 C.F.R. § 639.9(a).) These federal regulations make clear that the sale of a business does not constitute "actively seeking capital or business." 20 C.F.R. § 639.9 provides at subsection (a)(1) that "the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business."

Several courts interpreting the federal Warn Act requirements have concluded that the federal faltering company exception does not as a matter of law apply to the sale of a business.[2] In *Local 397, International Union of Electronic, Electrical, Salaried Machine and Furniture Workers v Midwest Fasteners, Inc.* (D. N.J. 1990) 763 F. Supp. 78, the manufacturer of welding fasteners and equipment sought to invoke the federal faltering company exception as it was attempting to find a purchaser for its business after efforts to secure new financing failed. The court analyzed the defendant employer's efforts and determined that at the time notice was required to be given, the employer had ceased all efforts to secure new financing and was

[2] California law does not provide any state counterpart to the "unforeseeable business circumstances" exception or the "natural disaster" exception set forth in 29 U.S.C. §§ 2102(b)(2)(A) & (B) and 29 CFR §§ 639.9(b) & (c).

attempting only to find a purchaser. The court held that the employer's coordinating of a sale of the facility did not qualify as "actively seeking capital or business," stating:

> If Congress intended a sale to fall within [the faltering company] exception, it would have expressed such an intent. Instead, Congress restricted what it specifically referred to as a "narrow" exception to the activities of seeking capital, such as obtaining loans, issuing bonds or stock, or the activity of securing new business.

(*See Local 397, supra,* 763 F. Supp. at 83.) The court cited to legislative history in support of its conclusion that Congress did not intend the narrow faltering company exception to apply to the sale of a plant:

> In the Act itself, Congress specifically addressed the allocation of the burden of providing notice when a sale of the business occurs. 29 U.S.C. § 2101(b)(1). This compels the conclusion that Congress did not overlook the possibility that a sale might affect a plant closing.

(*See id.*)

In *United Paperworkers International Union v. Alden Corrugated Container Corporation* (D. Mass. 1995) 901 F. Supp. 426, defendant manufacturers contested their liability under the federal Warn Act on numerous grounds, including the faltering company exception. There, after enduring extremely difficult market conditions and reorganization efforts, the employer's bank called its loan to the employer but agreed to allow the employer to continue its operation on a week-to-week basis to afford the employer the opportunity to find a purchaser for its business. Although the employer located an interested buyer, that prospective buyer advised the employer that its bank would not finance the acquisition. When the employer's bank learned of this development, the bank ordered the employer to close down nearly immediately. Citing the legislative history for the faltering company exception, the court held that at the time notice was required to be given, there was no evidence presented that the employer was seeking new business. (*See United Paperworkers, supra,* 901 F. Supp. at 441.) Citing *Local 397, supra*, the court also concluded that the details presented about the sale were insufficient to support a finding that the employer had carried its burden to demonstrate the applicability of the faltering company exception. (*See id.*, at 441-442.)

In *Law v. American Capital Strategies, Ltd.*, No. 3:05-0836, 2007 WL 221671, at *10 (M.D. Tenn. 2007), the court similarly concluded that the federal faltering company exception was not applicable where the closing occurred as a result of the failed sale of the business. In so holding, the court stated:

> The language of the statute and the regulations promulgated pursuant thereto speak in terms of the employer seeking capital or business which would allow the employer to avoid a shutdown, not a sale of the company which would allow another entity to the run the company.

(*See Law, supra,* 2007 WL 221671, at *10; *see also, Wallace v. Detroit Coke Corp.*, (E.D. Mich. 1993) 818 F. Supp. 192, 197-198 ["Here, rather than keeping the plant afloat, Crane tried to sell it—an option not covered under the exception."].)

Here, Telscape has failed to demonstrate that it is exempt from notice requirements under Section 1402.5(a)(1) for two reasons. First, the engagement agreement it cites as evidence that it was seeking capital or business was not entered into at the time notice was required. Second, the engagement was for the sale of the business' operating unit, not for the purpose of seeking capital or business within the plain meaning of Section 1402.5(a)(1). Accordingly, the requirements under Section 1402.5(a)(1) are not met here.

### B. Capital Or Business Sought Must Have Enabled Employer To Avoid Or Postpone Termination

Section 1402.5(a)(2) requires that the employer must show that the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination. Telscape provides no evidence to satisfy this element. From the record supplied and relied upon, the only option being pursued was a sale of Telscape's Wireline Service sales operations, not additional capital or business.

The federal regulations again do not support an exception to notice. They provide that "The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time." (*See* 20 C.F.R. § 39.9(a)(3).) Here, Telscape has failed to meet this condition because the only option being considered, which was pursued after notice was required, was a sale of the business's operating unit, its Wireline Service sales operations.

### C. Reasonable And Good Faith Belief That Giving Notice Would Preclude Employer From Obtaining Capital Or Business

Finally, the employer must have a reasonable and good faith belief that giving the notice would have precluded the employer from obtaining the needed capital or business. (*See* Section 1402.5(a)(3).) Again, the information and records submitted indicate that at the time notice was required, October 13, 2008, Telscape was not seeking capital or business within the meaning of Section 1402.5(a)(1) or the similar federal exception. Rather, after notice was required the engagement letter dated October 24, 2008, indicates Telscape was seeking a buyer for its Wireline Service sales operations.

Even if seeking a buyer constituted "seeking capital or business" within Section 1402.5(a)(1), and the overwhelming legal authority is clear that it is not, the information and documents presented do not sufficiently establish that providing notice would have precluded Telscape from securing a purchaser. Telscape fails to provide any objective evidence to support a determination that Telscape had a reasonable and good faith belief that giving notice would have precluded Telscape from obtaining needed capital. (*See Childress v. Darby Lumber, Inc.* (9th Cir. 2004) 357 F.3d 1000, 1009 ["appellants provided no evidence that they reasonably and in good faith believed that giving the 60-day notice to their employees during the negotiations with U.S. Bank would have precluded them from obtaining the credit from the bank."]; *see also United Paperworkers*, *supra*, 901 F. Supp. at 441 ["there is not a scintilla of objective proof in the record to demonstrate that this belief [that advising the employees of the company's financial condition would destroy the company's ability to market its business] was held reasonably and in good faith."].)

The federal regulations support this conclusion. 20 C.F.R. § 639.9(a)(4) provides in part:

> The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. *This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.*" [emphasis added.]

Here, no objective evidence is presented showing that the attempt, after notice was required, to sell its Wireline Service sales operations, would fail if notice had been timely provided to its workers.

Therefore, based on the information and documents presented, Telscape has not sufficiently established that it had a reasonable and good faith belief, as required under Section 1402.5(a)(3), that notice would have precluded it from obtaining capital or business.

## III. CONCLUSION

For the foregoing reasons and under the facts presented here, Telscape has not met the requirements under Section 1402.5. It is therefore not entitled to an exemption from the employee notice requirements contained in Section 1401.

Dated: March 4, 2010

John C. Duncan, Director
Department of Industrial Relations